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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 236

GERMAN S. LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 182–183) is reported at 305 F. 2d 825.

JURISDICTION

The judgment of of the court of appeals was entered on June 15, 1962 (R. 183). The petition for a writ of certiorari was filed on July 7, 1962, and was granted on October 15, 1962 (R. 184; 371 U.S. 859). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there is a genuine issue of entrapment in this case where the evidence did not suggest the defense, petitioner did not seek a judgment of acquit-

tal on that ground, did not request instructions on the issue and did not except to the instructions actually given by the trial court.

2. Whether, after an initial attempt at bribery by petitioner, the Revenue agent's listening with feigned acquiescence to a second bribe offer in petitioner's office, and secretly recording it, violated any right of privacy, so as to require exclusion of the agent's testimony reciting the conversation and the contemporaneous recordings.

STATUTE AND RULES INVOLVED

Section 201 of Title 18 U.S.C. provides as follows:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or

omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

Federal Rules of Criminal Procedure:

Rule 29(a) provides in pertinent part:

> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. * * *

Rule 30 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52 provides:

(a) Harmless Error.

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On November 8, 1961, a four-count indictment was returned against petitioner in the United States District Court for the District of Massachusetts charging him with attempted bribery of an Internal Revenue agent, in violation of 18 U.S.C. 201 (*supra*, p. 2). Count one charged that, on or about October 21, 1961, at North Falmouth, Massachusetts, petitioner gave $420 to Roger S. Davis, an Internal Revenue Agent, with intent to induce Davis to refrain from making an examination of books and records relating to the sales and receipts of the bar and lounge at Clauson's Inn for the years 1959–1961 and from computing the cabaret tax on such sales and receipts; count 2 charged that, on or about October 24, 1961, petitioner gave Davis $200 with the intent to influence him to aid in concealing from the Internal Revenue Service the sales and receipts at Clauson's Inn and any cabaret tax due for the years 1959–1961. Counts 3 and 4 charged that on October 24, 1961, petitioner promised Davis $200 and an expense-paid weekend for himself and his family at Clauson's Inn for the same purpose

(R. 2–5). Following a jury trial, petitioner was convicted on counts 2, 3 and 4 (R. 137), and was sentenced to imprisonment for a period of one year (R. 6–7). The court of appeals unanimously affirmed his conviction (R. 182–183; 305 F. 2d 825).

A. THE EVIDENCE

The evidence adduced at trial, and on the motion to suppress,[1] may be summarized as follows:

1. In late August 1961, Internal Revenue Agent Roger S. Davis was assigned to the Cape Cod area for various duties, including the investigation of possible evasion of excise taxes (R. 62). On August 31, about noon, Davis visited Clauson's Inn at North Falmouth, Massachusetts (R. 170), which petitioner operated under a lease (R. 12). Davis asked petitioner whether there was dancing, singing or other entertainment at the Inn during the evening hours. Petitioner replied there was none (R. 9, 170). When Davis showed petitioner an advertisement in the Cape Cod Guide for August 26, 1961, which listed "dinner, dancing and entertainment" for Clauson's Inn, petitioner said he was not responsible for this advertisement and knew nothing about it (Gov. Ex. 1; R. 9–10, 26–27, 171–172). After looking over the premises, Davis left (R. 10, 171). He returned that same evening and observed dancing in the bar and lounge. He did not speak to petitioner on this occasion, having been told that petitioner was not at the Inn (R. 10, 29–30, 126, 171–172). The following day the agent submitted a

[1] Prior to trial, petitioner filed a motion to suppress as evidence a recording of a conversation between himself and agent Davis which was held in petitioner's office at Clauson's Inn

report to his group supervisor as follows: "Subject: Cabaret surveillance, August 31, 1961. 1. Clauson's Inn, potential delinquent, North Falmouth, bar and lounge. Trio plays six nights. Jazz concert Sundays. When Trio plays there is some dancing although management claims that it does not allow such dancing. Will follow up" (R. 11; Gov. Ex. 2).

2. On the evening of October 21, 1961, Davis returned to Clauson's and saw patrons in the bar and lounge dancing to the music of a trio and heard a waitress sing one song. He then met petitioner who informed him that he operated the bar and lounge under a lease; that the trio played Friday and Saturday nights; that there was a piano player on Tuesday, Wednesday and Thursday nights; and that the juke box was used when the band was having a break. Davis expressed the opinion that the premises would be liable for a cabaret tax because of the dancing and asked to examine the books. Petitioner stated that his books were at the Inn, but that he wished to avoid any "inconvenience" from an examination of records (R. 11–12, 173–174).

Petitioner suggested that they go into his office, where the discussion was continued. The agent said that if a tax were due there would also be a penalty

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on October 24, 1961 (R. 5–6). After a hearing, Judge Wyzanski denied this motion (R. 165). At trial, the motion was renewed and again denied (R. 70–74).

Pertinent excerpts from the hearing on the motion to suppress are contained at record pp. 137–165, 170–182. For the convenience of the Court, the original transcript of the hearing has been lodged with the Clerk as has the original trial transcript.

for non-filing. Petitioner stated that he wished to avoid "this aggravation" and asked if they could not reach some sort of an "agreement." Davis said that they could not, that he "had a job to do," and that he would come back some time the following week so that petitioner could file a prompt return for the current quarter (ending October 31) to avoid a penalty (R. 13). Petitioner said that he did not want "to insult" Davis, but asked if the agent could not drop the case if he wanted to. Davis said that he could not and that he had filed a report following his earlier visit (*ibid.*). A few moments later, petitioner again stated that he did not wish "to insult" the agent and did not know whether to take him into "his confidence" (R. 13). Davis did not reply. At this point, petitioner opened his safe and laid some money on the desk near where the agent was sitting, with the comment: "You can drop this case. Here's $200. Buy your wife a present. And I'll have more money for you at Christmas time. This is all I have now" (R. 13–14). Davis told him "to take the money back" (R. 14). Petitioner urged Davis to take it, adding that he should bring his wife and family "down here for a week as my guest and stay at Clauson's Inn. Relax and play golf." Again Davis replied that he "had a job to do" and made some inquiries about the financial aspect of the business. Based upon petitioner's figures, Davis tentatively expressed the view that the tax for a year would amount to $3,000 (R. 14). Petitioner then added more bills to the money on the desk, stating that he did not wish to be bothered filing returns for

past years but that he would file a return for the current quarter (R. 14–15). After some further conversation—Davis repeating that he did not want the funds and petitioner angrily insisting that he take the money—the agent took the money, which now amounted to $420, and left the premises. This was about 10 p.m. Before Davis left, petitioner again told him that he would file a return for the current quarter and said that Davis should return the following Tuesday (October 24) before 12:30 p.m. (R. 14–15).

3. Davis immediately drove to another establishment in the area and placed a telephone call to the District Director's office in Boston. Upon receiving no response, Davis called a fellow agent and told him what had transpired. The agent told Davis to remain where he was and that he would have the group supervisor call Davis. At about 10:30 p.m., Davis received a telephone call from his group supervisor and recounted the incident to him (R. 15).[2] On the morning of Monday, October 23, Davis turned over the $420 to the Regional Inspector and furnished him with a sworn statement as to the events of October 21 (R. 16, 65–66, 95–97).

4. On the evening of October 23, Davis returned to Falmouth in the company of four Internal Revenue Inspectors (R. 16, 66). The next morning he was directed by the inspectors to return to Clauson's and keep his appointment with petitioner (see *supra*), to "pretend to play along with the scheme" and

[2] The other agent and the group supervisor testified at trial in corroboration of these telephone calls (R. 63–65).

to try to draw the conversation back to the events of October 21, including reference to the money already paid by petitioner (R. 17, 67, 151). Davis was searched by one of the inspectors and the amount of money he had was determined (R. 17, 68). Two electronic devices were then placed on his person. One was a Schmidt battery-operated radio transmitter, which was intended to transmit any conversation with petitioner to the inspectors who would be waiting outside the premises. This instrument failed to work (R. 17, 56, 67, 140–144). The second device was a "Minifon," a self-contained recording unit, which did not broadcast or transmit as it recorded (R. 17, 56, 67, 142–144).[3]

At the appointed time, Davis met petitioner at Clauson's Inn, and petitioner invited him to have lunch. The agent declined and suggested that they go into petitioner's office and talk (R. 17). Once inside the office, Davis removed from his brief case a blank form 720, federal excise tax return, and explained it to petitioner (R. 17–18). Petitioner said that he had never thought it necessary to file a return, that he wanted to take Davis into his confidence and that the agent should advise him if anything came up (R. 18). The agent then questioned petitioner about his receipts, which petitioner said totaled $160,000 per year. After a series of computations, Davis told him that the tax due would be over

[3] The "Minifon" was described as "a battery-operated wire recorder, in which a wire spool is placed, which will record conversation from 30 minutes to four hours, depending on the length of the spool" (R. 67).

$15,000 (R. 18–19).[4] Petitioner then said that he had something for the agent and handed him four fifty dollar bills. Petitioner added that he would have more money for Davis the following month (R. 19). In response to an inquiry from Davis, petitioner mentioned that he had given him $420 the previous Saturday night (October 21) (R. 19). When Davis asked what petitioner wanted in return for the funds, petitioner responded that he wanted to get by without filing a tax return until Davis advised him that the pressure in Davis' office made filing a current return necessary (R. 20). Petitioner asked Davis whether it would be a good idea to put up a no-dancing sign "to make it look good" (*ibid.*). The agent replied that he "couldn't suggest anything" (R. 20). When Davis said he might bring his wife down to the Inn petitioner told him to do so for a weekend as his guest (R. 21). He said that he would have another $200 for Davis the coming month (R. 21).

Following this interview, Davis met with the four inspectors who removed the electronic devices from his person. They also searched him and found four fifty-dollar bills (R. 23, 68–89; Gov. Ex. 5). That same day, Davis listened to a playback of the recording (R. 24, 69), and testified at the trial that it was accurate(R. 24). The recording of the conversation was played for the jury over defense counsel's objection (previously made on the motion to suppress) that it was inadmissible under the Fourth Amend-

[4] The agent stated that he made several errors in his computations "due to nervousness" (R. 19).

ment as the fruit of a fraudulent entry into petitioner's private office (R. 70–78). This recording corroborated Davis's account of the conversation in detail (R. 80–94).

5. Petitioner testified in his own behalf. He stated that he had commenced operating the lounge and restaurant at Clauson's Inn in March 1959 (R. 102); that a no-dancing sign had been in the lounge for nearly three years and was there on August 31, 1961;[5] and that when he spoke to agent Davis on the early afternoon of August 31, petitioner advised Davis that he (petitioner) was not required to file a cabaret tax since there was no entertainment at Clauson's (R. 103–104). That evening, petitioner stated, he saw Davis on the premises but did not talk to him. Petitioner further testified that on October 17, there had been a change of policy at the Inn which resulted in a switch to entertainment, including dancing and singing (R. 102). When Devis returned on October 21, petitioner reported this change and said he expected to file returns from that point on (R. 108, 155). Davis then asked petitioner about his rental arrangement with Clauson's and the amount of business he did (R. 108–109, 155–156). When Davis asked to inspect the books, saying that there was a cabaret tax due, petitioner responded that the books were in order, and denied that he owed any past cabaret taxes (R. 109–110, 156–157). According to petitioner, Davis then stated that if he were to examine petitioner's books, he would find that "ten to fifteen thousand dollars in

[5] Agent Davis had denied having seen any such sign at the premises (R. 30).

cabaret tax" was owing (R. 110, 156). Petitioner denied the liability (*ibid.*). Davis then stated that he would like to spend a weekend at the resort with his wife (R. 157). Petitioner responded: "Please do. Be my guest." (R. 110, 158). At this point petitioner said he asked Davis if he would be willing to prepare and file his cabaret tax when it came due, on his own time, and Davis answered, "that all depends" (R. 111, 158). Petitioner then removed $200 from his pocket and added another $100 from the safe, and offered it to the agent (*ibid.*). Petitioner testified that Davis said this amount was not enough, he could not jeopardize his position for that sum. According to petitioner, he told Davis that he was not asking him to jeopardize his position but merely to prepare his returns and to do whatever was necessary to get his books in proper order (R. 111–112, 114). When Davis replied that he could not waste time for that, petitioner got another $120 from the cashier, and told Davis he would have more money for him the next time he came down to help prepare his books. Davis said he would be back the following Monday or Tuesday (R. 112, 158–159).

As for the meeting on October 24, petitioner testified generally that Davis went into a lot of figures and petitioner became emotionally upset because he felt that Davis was not there for the purpose for which he had previously arranged to return (R. 112, 114–115). Petitioner also discussed the fact that his wife had been upset at his previous dealings with

Davis (R. 114, 116),[6] and that, after the agent left, he checked as to whether Davis was, in fact, an internal revenue agent (R. 116–117). Petitioner did not testify concerning the other aspects of his conversation with Davis on October 24, nor did he touch upon the accuracy of the wire recording of that conversation.

Petitioner's part-time bookkeeper, who testified as a defense witness, stated that he had made a journal entry on the books on October 18, 1961, pursuant to petitioner's instructions (R. 118–119), which read, "1961, October 16. Change in policy in entertainment. From this date liquor sales subject to cabaret tax during entertainment hours. The tax is to be deducted from beverage sales, which are subject to a rent charge" (R. 120; Def. Ex. D). He further testified that he had seen the no-dancing sign from time to time since petitioner had begun operating the bar and lounge (R. 118–119, 122).

B. THE INSTRUCTIONS

After instructing the jury that the defendant has the benefit of a presumption of innocence and that the government must establish "every essential element" of the crime beyond a reasonable doubt (R.

[6] Petitioner's wife testified that her husband had told her that he had taken $100 from the safe and $120 from the cashier, to pay an Internal Revenue agent who was going to file tax returns for him. She insisted that they should make up these funds from their own pockets, which they did. She further said that she and her husband argued continuously about the payment to Davis, but she did not call the Internal Revenue Service because of petitioner's opposition to such a procedure (R. 123–125).

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127), the court charged that the government's burden under the statute was as follows (R. 128–129):

> First, the government must prove that the defendant gave or promised something of value. Second, the government must prove beyond a reasonable doubt that the gift or promise was made to an officer or employee of the United States. Third, the government must prove beyond a reasonable doubt that the person to whom the offer or gift or promise or payment was made was acting in an official function. Fourth, the government must prove beyond a reasonable doubt that the defendant knew that the person was an officer, or agent, and was acting in his official capacity. And, fifth, the government must prove beyond a reasonable doubt that he did it with the necessary specific intent spelled out in the statute, that intent, speaking loosely, being to defraud or to induce a fraud upon the United States.

The court then called the jury's attention to the difference between the first count and the other three counts of the indictment, observing that petitioner's intent, as alleged under count one, was to induce agent Davis not to inspect his books which, the court said, was a narrower charge than that contained in the three other counts. The court invited the jury's close scrutiny as to whether, with respect to this charge, specific intent had been shown beyond a reasonable doubt (R. 130–132).[7]

[7] The court charged in this connection (R. 132): "Now are you persuaded beyond a reasonable doubt, that the defendant had that particular specific intent, to wit, to keep Davis from making an examination of the books and records, or, on the contrary, are you of the view that the defendant correctly testi-

On the question of entrapment the court instructed (R. 133–134):

> Now there are some other matters to which it is important that I should call to your attention, and one of them is a defense which was raised in argument by Mr. Davis, the lawyer, speaking on behalf of Mr. Lopez. It was his suggestion to you that in this case the defendant should not be convicted because he was entrapped. If I understood Mr. Davis' argument to you correctly, he suggested to you that Roger Davis, the Agent, proposed that he, Roger Davis, and his wife, might have the benefit of a free weekend or free golfing experience at Clauson's Inn, and that this was a method of soliciting a bribe and entrapping the defendant.
>
> Mr. Davis, the lawyer, also suggested to you that in making these computations so-called of a tax which might be due on account of a cabaret, if there were one, or on account of dancing, if there were, Agent Davis obviously, in Mr. Lawyer Davis' view prepared some inflated figures and was using this as a kind of bait for inducement to a bribe.[8]
>
> Now the law with respect to entrapment is this: if a government agent by improper means or overbearing persuasion or wrongful conduct

---

fied when he said that he made available all the books and records, and that he was willing to have them examined either on the premises or elsewhere?

"It is not up to me to say what I believe, but it is up to me to point very sharply to the particular language of this Indictment, and to invite your close scrutiny as to whether that particular, specific intent charged by the Grand Jury is indeed supported beyond a reasonable doubt."

[8] We have filed with the Clerk the transcript of counsel's closing argument to the jury.

induces a person of ordinary firmness to commit a crime which he would not otherwise commit, then under those circumstances, the defendant is to be acquitted, not because he did not do something wrongful but because he was induced to do a wrongful act which he would not otherwise have done.

Now needless to say in all types of law enforcement, particularly with respect to matters involving certain types of regulatory statutes, it is often difficult for the government to get evidence, and government agents may properly, and without violating the law, or their duty, take such steps as make it possible to procure evidence even though such steps involve their own participation, provided that their participation is not a deliberate temptation to men of ordinary firmness, provided that they do not cause a crime to be committed by someone who does not have a criminal disposition to commit that crime.

The burden of proof with respect to entrapment is on the defendant. And you are to ask yourself whether in fact on the evidence you heard you are persuaded by the preponderance of that evidence that Agent Davis, as it were, created the crime and the temptation, and he, Agent Davis, was the instigator and author of a crime that would never under any circumstances have taken place, had he not used unfair means.

Petitioner took no exceptions to the charge (R. 137). The jury acquitted on count 1 and found petitioner guilty on the remaining 3 counts (*ibid.*); see *supra*, pp. 4–5). Petitioner filed no motion for a judgment

of acquittal during the trial and no motion for a new trial, but did file a motion for judgment notwithstanding the verdict with respect to counts 2, 3 and 4 (R. 6).

SUMMARY OF ARGUMENT

I

A. Petitioner's argument that he was entitled to a judgment of acquittal on the ground of entrapment rests essentially upon the assumption that his acquittal on count 1 wiped the slate clean of the events of October 21 and that what occurred on October 24 must therefore be judged without regard to what had gone before. The premise is erroneous. Considering the limited scope of the first count, the jury verdict of acquittal did not imply rejection of the agent's testimony with respect to the unsolicited bribe offer of October 21. In any event, since there is no requirement that a jury verdict on various counts be consistent, the evidence relating to the events on that date need not be disregarded. Taking all the evidence together, there can be no doubt that petitioner was not entrapped.

Even if viewed in isolation, the events of October 24 do not make out a case of entrapment. The record of the conversation between petitioner and agent Davis on that date shows that the agent, by his remarks and responses to petitioner's statements, was not inducing or creating crime, but simply affording petitioner the freedom to commit a criminal act, if he so desired, in a way that would be susceptible of proof.

Petitioner's defense, denying commission of the crime, and his own testimony at trial, is inconsistent

with the belated claim of entrapment. The fact is that no such issue is revealed by the record. At least, having failed to present evidence on entrapment, requested no judgment of acquittal on that ground, offered no entrapment instruction and taken no exception to the instruction actually given by the court, petitioner is foreclosed from urging on appeal that he was entitled to acquittal as a matter of law on a defense of entrapment.

B. Petitioner was not prejudiced by the trial court's instructions on entrapment. The charge that government agents may take various steps to procure evidence "provided that their participation is not a deliberate temptation to *men of ordinary firmness*" (emphasis added) is in accord with the standards announced by this Court in *Sherman* v. *United States*, 356 U.S. 369, 372, 384, and *Sorrells* v. *United States*, 287, U.S. 435, 445.

The instruction that the burden of proof with respect to entrapment falls wholly on the defendant was, we concede, not a complete or a correct statement of the law. But it did not prejudice petitioner. In the present context, in the face of petitioner's denial of the crime and his failure to suggest governmental inducement, it would have been pure fiction for the trial court to instruct the jury that the government had the burden to show that the defendant was ready and willing to commit the offense. In submitting the question to the jury, the trial court gave petitioner more than his due. In any event, petitioner's claim of error, not plainly prejudicial, comes too late.

II

Agent Davis' testimony as to his conversation with petitioner on October 24 and the recording of that conversation (by Minifon) were properly admitted into evidence. In this respect, the case is governed by *On Lee* v. *United States*, 343 U.S. 747.

There was no violation of the Fourth Amendment guarantee against unreasonable intrusions on privacy. Entry into petitioner's office was not gained by illegal means. In any event, there was no violation of the privacy of that room. Under the circumstances, the locale was irrelevant.

Nor was there an impermissible eavesdropping on a private conversation. The attempt to bribe a public official, which the intended recipient proposes to divulge, is never a private communcation. The contemporaneous recording, which merely duplicated the agent's own mental record of the matter, does not affect the question.

The agent's conduct was not otherwise improper. It was in all respects permissible law enforcement activity.

ARGUMENT

I

NO REVERSIBLE ERROR WAS COMMITTED IN THE HANDLING OF THE QUESTION OF ENTRAPMENT

Although he made no motion for a judgment of acquittal on the ground of entrapment, made no request for an instruction on entrapment, and took no exception to the charge given, petitioner now claims (1) that the evidence establishes entrapment as a

matter of law and (2) that, in any event, the trial court's instructions on entrapment constitute such plain error as to require reversal under Rule 52 of the Federal Rules of Criminal Procedure (*supra*, p. 4). We first show that the claim of entrapment as a matter of law is utterly refuted by the facts of record. We then point out that, as the lateness of the claim itself suggests, entrapment was never a genuine issue in the case, and that submission of the question to the jury worked a gratuitous advantage in petitioner's favor, so that any error in the instructions cannot have prejudiced him.

A. PETITIONER WAS NOT ENTITLED TO A JUDGMENT OF ACQUITTAL ON THE CLAIM OF ENTRAPMENT

Petitioner's present argument that he was entitled to a judgment of acquittal on the defense of entrapment stems largely from a misconception of the effect of his acquittal on count 1. Petitioner makes two erroneous assumptions: (1) that, since he was acquitted on count 1 of the indictment, the government's evidence on that count must be wholly rejected, while his version of the events of October 21 must be accepted as true; and (2) that the case must be judged as though no bribe offer had been made by petitioner on October 21. On those assumptions petitioner argues that the government's activity on October 24—the use of the recording device and agent Davis' express readiness to "play along"—constituted improper conduct which amounted to entrapment. The fact is, however, that the acquittal on count 1 does not show that the jury rejected the evidence of petitioner's unsolicited offer of a bribe on that date. Nor

does Davis' conduct on October 24 suggest entrapment, even if judged in isolation.

1. The acquittal on count 1 does not require that the evidence of an unsolicited bribe on October 21 be disregarded.

Count 1 of the indictment differed from the other three counts in that it was more narrowly framed, charging that petitioner offered and gave a bribe with the specific intent to induce agent Davis to refrain from examining his books and records.[9] Counts 2, 3 and 4 were more broadly based, alleging that petitioner's criminal intent was to obtain the agent's help in concealing the sales and receipts at Clauson's and any cabaret tax due for the operation of the bar and lounge (R. 2–5). The trial judge made pointed reference to this distinction in his instructions, strongly intimating that the government had failed to establish beyond a reasonable doubt the specific intent alleged in count 1, in view of petitioner's testimony that he had made available his books and records and was willing to have them examined (R. 132). The court stressed petitioner's testimony in this regard and observed that it was his duty "to point very sharply" to the language of count 1 and "to invite [the jury's] close scrutiny as to whether that particular, specific intent charge[d] by the Grand Jury is indeed sup-

[9] Following the literal language of the indictment (R. 2–3), the count might be read more broadly as charging an intent to induce the agent to refrain from "computing" the tax and "reporting" the liability independently of an examination of the taxpayer's books. But the trial judge clearly did not so read it, and the jury was, of course, bound by his interpretation of the charge.

ported beyond a reasonable doubt" (R. 132, see also R. 130–131). The court, in short, invited, indeed, almost directed, a judgment of acquittal on count 1.

In these circumstances, the jury may have acquitted under Count 1, even though it fully believed the government's evidence that petitioner had given some, and promised additional, money to Davis on October 21, because it concluded that the government had not shown the requisite intent required to convict under that count. In other words, the jury could well have believed that an unsolicited bribe had been offered on that date, but for a different purpose than was charged in Count 1, *i.e.*, that it was offered not to induce Davis to refrain from examining the books, but to secure his help in cancelling possible tax liabilities.

In any event, there is no requirement that a jury verdict on various counts be consistent. *Dunn* v. *United States*, 284 U.S. 390, 393–394. Whatever the jury concluded as to the transaction of October 21, we need not disregard evidence of what transpired on that day if it is relevant to the remaining charges. Its importance in showing petitioner's predisposition to attempted bribery is self-evident. Nothing that occurred on October 24 could change the basic fact that petitioner had already, three days earlier, betrayed his purpose to solve his tax problems by offering a bribe to the investigating agent.

2. The evidence does not support the claim of entrapment as a matter of law.

(a) As to the events of October 21, Agent Davis' testimony was unequivocal. Neither directly, nor by inference, did he ask for, or suggest a bribe. On the

contrary, the agent's testimony was that petitioner pressed a bribe upon him and insisted that he take it after the agent had told him to put the money back. And petitioner's version of the events of October 21, even if accepted as true, does not show entrapment. According to petitioner, he himself informed Davis of a change in the Inn's policy as of October 17, which would require the payment of taxes thereafter, and upon his own initiative and without any inducement by the agent, he invited the agent to assist him in the preparation of his books and tax returns, paying Davis $420 for this purpose alone (R. 107–112).

Petitioner did testify that during their conversation the agent stated that he would like to spend a weekend at Clauson's (R. 110–111). The trial judge understood petitioner's counsel to have suggested to the jury in closing argument that this amounted to the solicitation of a bribe and an entrapment of the defendant (R. 133). The judge's charge was largely a response to this argument (see *supra*, p. 15). But petitioner's claim (which Davis emphatically denied (R. 44)) does not show entrapment as a matter of law. Nor does it suggest a factual issue of entrapment in the present context. A suggestion by the agent that he would like a free weekend (even if it had been made) could not have implanted in the mind of the defendant the idea that he should pay $420 for alleged services. Moreover, solicitation of a personal gift by a government official is extortion, not illegal entrapment. "Entrapment involves the action of overzealous government agents acting for the government inciting an innocent man to crime.

Extortion on the other hand, is based on conduct by dishonest employees attempting action against the government." *United States* v. *Kabot*, 295 F. 2d 848, 854 (C.A. 2), certiorari denied, 369 U.S. 803. But, in any event, petitioner himself never testified that the suggestion of the free weekend led him to offer and pay money to Davis. According to petitioner's trial testimony, he gave money to the agent on October 21 for the sole purpose of having the agent "help [him] to prepare and file [his] cabaret tax whenever it comes due * * * [and] to get [his] books properly in order * * *" (R. 111; see *supra*, pp. 11–12).

The unsolicited bribe offered the agent on October 21 makes it clear that when the agent returned three days later, by pre-arrangement, petitioner was already disposed to commit the crime. Not only was the idea then in his mind, but he thought, indeed, that he had already succeeded. Accordingly, there can be no question of entrapment on October 24 if the prior transaction is taken into account.

(b) Even if the events of October 24 are viewed in isolation, neither the government's evidence nor that submitted by petitioner establish entrapment. The fact that the government agent pretended to "play along" with petitioner, and recorded his conversations, does not show illegal inducement to criminal activity. The record of the conversations on October 24 shows that the agent did not initiate discussion of a bribe. All he did was indicate by the tenor of his conversation and his responses to statements made by petitioner that he was receptive to petition-

er's offers in this regard. He simply provided petitioner with the freedom to commit a criminal act. This is not entrapment. At most, it suggests the type of enforcement activity which this Court has recognized as proper and which it has taken pains to distinguish from entrapment. As the Court has said, "Entrapment occurs only when the criminal conduct was the 'product of the *creative* activity' of law-enforcement officials". *Sherman* v. *United States,* 356 U.S. 369, 372 (emphasis in the original). It exists "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells* v. *United States,* 287 U.S. 435, 442. It is not entrapment, however, where all that is shown is governmental "stealth and strategy," *Sherman, supra,* 356 U.S. at 372, which "merly afford opportunities or facilities for the commission of the offense. * * * Artifice and stratagem may be employed to catch those engaged in criminal enterprises." *Sorrells, supra,* 287 U.S. at 441.

At the trial, petitioner virtually remained silent concerning the particulars of his meeting with Davis on October 24. He confined himself to general statements to the effect that Davis went over a lot of figures and that he became nervous and upset because he felt that the agent was not there for the purpose for which he had come on October 21, and he described his wife's displeasure on learning that he had given the agent money (R. 114–117). His testimony, in short, did not even suggest entrapment on that

date. The trial judge, in his statement preceding the charge on entrapment, noted that petitioner's counsel had suggested that Davis' estimate of the tax due was inflated so as to induce a bribe (R. 133–134). Petitioner now rests largely on this claim that the government agent made false statements as to the existence of excise tax obligations in his discussions with petitioner on October 24, and argues that these statements constituted the creative genesis of the criminal act. But, from all that appears in the evidence, the agent had every reason to believe that taxes were due. Certainly he had a right to investigate (see Statement, *supra*, pp. 5–6). In any event, petitioner himself never claimed that the agent's statements concerning the amount of past taxes apparently due triggered or induced the bribe offer.

The sum of it is that nothing in either the agent's or petitioner's version of the events even suggests that petitioner's delivery of money to the agent was induced by governmental activity. Entrapment is a belated claim, devised for the argument. It is not in the record of the trial.

(c) Not only did petitioner fail to present evidence at trial suggesting that he was entrapped into crime by the activities of agent Davis, but the defense at trial was the antitheses of an entrapment claim. Petitioner did not admit giving the agent money and making promises to avoid payment of a tax. Nor, of course, did he say he did so under official cajoling and pressure. On the contrary, his trial defense was that his conduct was not criminal. He testified that he never attempted to bribe the agent. His story at

trial was that he offered money and other benefits to Davis as part of a business arrangement, whereby, completely separate from Davis' official status, the agent was to prepare petitioner's tax returns and do whatever else was necessary to put petitioner's books in order (See R. 111–112, 114).

It has been noted that it is an "anomaly" to assert the position of "I didn't do it, but if I did, I was entrapped." *Stein* v. *United States*, 263 F. 2d 579, 581 (C.A. 9). But, whether or not such inconsistent defenses are available where the accused submits supporting evidence on both, and preserves both for appellate review,[10] the contradiction must be weighed against a claim of entrapment belatedly asserted on appeal. *Ramirez* v. *United States*, 294 F. 2d 277, 283 (C.A. 9); see also *Ware* v. *United States*, 259 F. 2d 442, 445 (C.A. 8); *Rodriguez* v. *United States*, 227 F. 2d 912, 914 (C.A. 5); *Eastman* v. *United States*, 212 F. 2d 320, 322 (C.A. 9); *Siglar* v. *United States*, 208 F. 2d 865, 868 (C.A. 5), certiorari denied, 347 U.S. 991. "A defendant may not lie back, take his chance on acquittal on the issue on which he places his main or, as in this case, his sole reliance, and, when that fails, seek to have a judgment of conviction reversed on a ground not pressed on the trial court." *Moore* v. *United States*, 262 F. 2d 216, 218 (C.A.D.C.), certiorari denied, 359 U.S. 959. "[H]e cannot have his cake and eat it too." *Coronado* v. *United States*, 266 F. 2d 719, 721 (C.A. 5). Certainly, under the cir-

[10] See *Hansford* v. *United States*, 303 F. 2d 219, 221 (C.A.D.C.); *Crisp* v. *United States*, 262 F. 2d 68, 70 (C.A. 4).

cumstances, petitioner was not entitled, as a matter of law, to a judgment of acquittal. See Rule 29(a), Federal Rules of Criminal Procedure, *supra*, p. 3; see also, *Jasso* v. *United States*, 290 F. 2d 671, 673 (C.A. 5), certiorari denied, 368 U.S. 858; *Costner* v. *United States*, 271 F. 2d 261 (C.A. 6), certiorari denied, 362 U.S. 952; *Corbin* v. *United States*, 253 F. 2d 646, 647 (C.A. 10); *Picciurro* v. *United States*, 250 F. 2d 585, 589–590 (C.A. 8); *Ege* v. *United States*, 242 F. 2d 879, 883 (C.A. 9).

B. PETITIONER WAS NOT PREJUDICED BY THE TRIAL COURT'S INSTRUCTIONS

1. The charge was not prejudicially erroneous.

(a) Petitioner criticizes the trial court's entrapment instructions on two grounds (Pet. Br. 26–32). First he says that the Court submitted an incorrect standard to the jury in charging that government agents may take various steps to procure evidence "provided that their participation is not a deliberate temptation to *men of ordinary firmness*" (emphasis added; see *supra*, p. 16); that the proper test, petitioner argues, is whether *he*, not an ordinary person, was entrapped. The claim is without merit. The challenged language was wholly consistent with the statement of this Court in *Sherman* v. *United States*, 356 U.S. 369, 372, that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal," and that approved in *Sorrells* v. *United States*, 287 U.S. 435, 445, that "decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime." In fact, the statement complained of is in sub-

stance identical with the language of the concurring opinion in *Sherman* v. *United States*, 356 U.S. 369 at 378, 384, that agents "should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations."

(b) Petitioner's second challenge is that the trial court erroneously instructed that the burden of proof with respect to entrapment falls on the defendant (Pet. Br. 29–30). We do not say that this portion of the charge was a complete or a correct statement of the law. We may concede, *arguendo*, that the better practice is to place only the initial burden of establishing a *prima facie* case on the accused, and then shift the burden to the prosecution.[11] But, in our

[11] There are cases in which an entrapment instruction has been expressly or implicitly approved on appeal even though not couched in terms of burden of proof. See *e.g.*, *Martinez* v. *United States*, 300 F. 2d 9, 10, 11 (C.A. 10); *Marks* v. *United States*, 260 F. 2d 377, 381 (C.A. 10), certiorari denied, 358 U.S. 929; *Chapman* v. *United States*, 271 F. 2d 593, 595 (C.A. 5); *Demos* v. *United States*, 205 F. 2d 596, 599 (C.A. 5), certiorari denied, 346 U.S. 873; *De Marco* v. *United States*, 296 Fed. 667, 669 (C.A. 4), certiorari denied, 265 U.S. 593. But where the issue has been squarely posed, the rule seems to have emerged that there is an initial burden upon the defendant to make a showing of entrapment which, if met, shifts to the government an affirmative obligation to refute the defense by proving a sufficent excuse for the inducement. In *Sherman* v. *United States*, 200 F. 2d 880, 882 (C.A. 2), Judge Learned Hand observed:

"* * * in such cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity

view, the error, if any, is of no practical importance here.

In the circumstances of this case it could make no difference what formulary language was used. The fact is that petitioner never made a *prima facie* showing of entrapment. Accordingly, it would have been pure fiction for the trial court to instruct the jury that the government had the burden to show that the defendant was ready and willing to commit the offense, for such an instruction would have presupposed, contrary to petitioner's theory of defense, that an offense had been committed and that governmental inducement was claimed.

2. *The trial court, in charging entrapment, gave petitioner more than was his due.*

In view of the absence of evidence suggesting entrapment as an issue, the trial judge might properly have refused to give an instruction on entrapment even it it had been requested. Certainly, the judge was not required to give such a charge on his own motion. See *Landers* v. *United States*, 304 F. 2d 577, 582 (C.A. 5); *United States* v. *Kabot*, 295 F. 2d 848, 854 (C.A. 2), certiorari denied, 369 U.S. 803; *United States* v. *Lile*, 290 F. 2d 225, 226 (C.A. 6); *United States* v. *Gironda*, 267 F. 2d 312 (C.A. 2), certiorari

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to commit the offence. On the first question the accused has the burden; on the second the prosecution has it. * * *"

See, to the same effect, *United States* v. *Masciale*, 236 F. 2d 601, 603 (C.A. 2), affirmed, 356 U.S. 386; *United States* v. *Landry*, 257 F. 2d 425, 428–429 (C.A. 7); *Hansford* v. *United States*, 303 F. 2d 219, 224 (C.A.D.C.); *Ryles* v. *United States*, 183 F. 2d 944, 945–946 (C.A. 10), certiorari denied, 340 U.S. 877.

denied, 361 U.S. 848; *United States* v. *Place*, 263 F. 2d 627, 629–630 (C.A. 2), certiorari denied, 360 U.S. 920; *United States* v. *Waldin*, 253 F. 2d 551, 554–555 (C.A. 3), certiorari denied, 356 U.S. 973; *Costello* v. *United States*, 252 F. 2d 750, 751 (C.A. 5); *Murray* v. *United States*, 250 F. 2d 489, 492 (C.A. 9), certiorari denied, 357 U.S. 932; *Rodriguez* v. *United States*, 227 F. 2d 912, 913–914 (C.A. 5); *United States* v. *White*, 223 F. 2d 674, 676 (C.A. 2), certiorari denied, 350 U.S. 888; *Greatreaks* v. *United States*, 211 F. 2d 674, 677 (C.A. 9).

Under the circumstances, in submitting the issue of entrapment to the jury, the trial judge gave petitioner more than was his due and it ill behooves petitioner, who did not request instruction on the issue, and failed to object to the charge given, now to claim prejudicial error.[12] The plain fact is that *any* charge on entrapment, when none is required, redounds to the benefit of the accused. Petitioner was, in effect, offered a gratuitous second defense, to which he was not entitled. It follows that, whatever errors exist, he cannot have been prejudiced.

At all events, since petitioner neither requested an instruction on entrapment nor took exception to the instruction actually given, and, since the error, if any, is not plainly prejudicial, the claim comes too late. Rule 30, Federal Rules of Criminal Procedure, *supra*,

[12] See, *e.g.*, *United States* v. *Place*, 263 F. 2d 627, 629–630 (C.A. 2), certiorari denied, 360 U.S. 920; *Bruno* v. *United States*, 259 F. 2d 8, 11 (C.A. 9); *United States* v. *Klein*, 108 F. 2d 458, 459 (C.A. 7). Cf. *Conway* v. *United States*, 142 F. 2d 202, 205 (C.A. 9); *Tudor* v. *United States*, 142 F. 2d 206, 208 (C.A. 9).

p. 3; see generally, *Moore* v. *United States*, 262 F. 2d 216, 218 (C.A.D.C.), certiorari denied, 359 U.S. 959; *Cellino* v. *United States*, 276 F. 2d 941, 947 (C.A. 9); *Walker* v. *United States*, 285 F. 2d 52, 57 (C.A. 5); *United States* v. *De Marie*, 226 F. 2d 783, 787 (C.A. 7), certiorari denied, 350 U.S. 966. The rule of *Martinez* v. *United States*, 300 F. 2d 9 (C.A. 10), which also involved a belated complaint about the trial court's failure to instruct as to the burden of proof on the issue of entrapment, seems fully applicable here: "There was no error in the instruction on entrapment which so affected the substantial rights of the defendant as to warrant consideration without an objection." 300 F. 2d at 11.

II

THE AGENT'S TESTIMONY AS TO HIS CONVERSATION WITH PETITIONER ON OCTOBER 24, AND THE RECORDING THEREOF, WERE PROPERLY ADMITTED INTO EVIDENCE

Petitioner's contention that the disclosure of his conversation with Agent Davis by any means—through the agent's testimony or the playing of the recording—violated the Fourth Amendment is without foundation. This feature of the case is governed by *On Lee* v. *United States*, 343 U.S. 747, 754.

There, the defendant was induced to make certain incriminatory statements by an old acquaintance and former employee who, unbeknownst to the accused, had turned informer and carried, concealed, a small microphone which transmitted the confidences to a narcotics agent some distance away. One conversation occurred in the defendant's laundry, the other on the

public street. As to both, the Court held the eavesdropping agent's testimony admissible, though the informer himself did not testify. Here, petitioner in the office of the inn, attempted to bribe a Revenue agent, knowing the agent for what he was, but ignorant of the recording device hidden on his person and unaware of his purpose to reveal the confidences communicated. The parallel between the cases need not be elaborated. What distinctions can be drawn clearly point to the present instance as involving less deception.

Since petitioner does not challenge the decision in *On Lee*,[13] we might rest here. But we deem it appropriate to examine the Fourth Amendment claim more closely. It will appear that the present case involves no invasion of privacy whatever, nor any impropriety in the law enforcement methods employed.

A. THE USE OF THE RECORDING DEVICE WAS, UNDER THE CIRCUMSTANCES, UNOBJECTIONABLE

There is here, as in all such cases, an undefined suggestion that the use of an electronic device in obtaining evidence is somehow improper in itself. Peti-

[13] The *On Lee* decision has never been overruled, modified or otherwise limited by this Court. See *Silverman* v. *United States*, 365 U.S. 505, 508. And it has been uniformly followed by the various courts of appeals which have had occasion to consider it. See *e.g.*, *Anspach* v. *United States*, 305 F. 2d 48, 50–51 (C.A. 10), certiorari denied, 371 U.S. 826; *Todisco* v. *United States*, 298 F. 2d 208, 209–210 (C.A. 9), certiorari denied, 368 U.S. 989; *United States* v. *Kabot*, 295 F. 2d 848, 853 (C.A. 2), certiorari denied, 369 U.S. 803; *United States* v. *Finazzo*, 288 F. 2d 175, 177 (C.A. 6), certiorari denied, 368 U.S. 837; cf. *Carnes* v. *United States*, 295 F. 2d 598, 602 (C.A. 5), certiorari denied, 369 U.S. 861.

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tioner, it is true, avoids such a bald claim. On the contrary, he expressly says his "real ground of objection" is that "all evidence" of the conversation between himself and the Revenue agent, "whether in the form of testimony of the agent or as recorded in the Minifon," ought to have been suppressed (Pet. Br. p. 35). Yet, only the recording was initially objected to and reiterated references to the Minifon keep alive the notion that the intrusion of the instrument is what taints the law-enforcement activity in this case. The suggestion ought to be put to rest.

The fact is that there is nothing inherently objectionable about the use of a recording device. Such instruments are offensive only when, and to the extent, that the prying of the eyes or ears for which they substitute would be offensive. Under circumstances where it would violate the Fourth Amendment for a human agent to observe or listen, so would it be a violation to photograph, or televise, record or transmit, from the same vantage point. But the instrument is not banned from the area where the live witness is admitted merely because it is more reliable or more accurate, or because it gives unimpeachable testimony. As the Fifth Circuit has said, "the only difference between a person testifying to a conversation which he participated in or overheard and a recording of the conversation is that the recording has the advantage of furnishing trustworthy evidence * * *". *Carnes* v. *United States,* 295 F. 2d 598, 602 (C.A. 5), certiorari denied, 369 U.S. 861. Indeed, this Court has held that, so long as it does not invade a constitutionally protected area, the de-

tection device may be employed even though it probes secrets beyond the reach of the human eye or ear. See *Olmstead* v. *United States*, 277 U.S. 438; *Goldman* v. *United States*, 316 U.S. 129.

A fortiori, recording devices are not objectionable when, as here, they only duplicate what the live witness sees or hears. Thus, no one would question the legality of photographing, from an exterior vantage point, what the cameraman himself permissibly observes. And, certainly, it does not matter whether the camera is displayed or secreted. Nor does it change the picture if the instrument is assimilated to a second human witness. Is the result different when the recording device is introduced *into* a private sanctuary by an authorized witness who will himself mentally record, and divulge, the same events? We think not.

Indeed, the presence of the authorized human agent already destroys what privacy existed, and it cannot really matter that there are now two witnesses, rather than one. As the Ninth Circuit has said in a similar case, the objection to the instrument amounts to the assertion of a "right to rely upon [the agent's] apparent inability to produce proof beyond his own testimony of the substance of the conversation in which he engaged with [the accused, and] [t]his has little relation to an intrusion upon privacy which is the problem at the heart of the constitutional issues presented by eavesdropping." *Todisco* v. *United States*, 298 F. 2d 208, 210 (C.A. 9), certiorari denied, 368 U.S. 989.

Even if the instrument is equated to a trespasser secretly introduced into the room, no real violation of privacy can result when the eavesdropping is limited to what another already mentally records for subsequent publication. *On Lee*, of course, has settled the question. But the rule is even clearer in a case like this one where the human witness actually testifies and the machine merely repeats and corroborates his narrative.

We conclude with petitioner that the fundamental question here is whether the Revenue agent himself is guilty of such a violation of privacy that his own testimony should have been suppressed. If he is innocent, so is his instrument.

B. THERE WAS NO INVASION OF THE PRIVACY OF PETITIONER'S OFFICE

Focusing on Agent Davis himself, petitioner insists that he obtained access to the Inn's "private" office by "misrepresentation," which vitiated petitioner's acquiescence in using the office for the discussion during which the bribe was offered (Pet. Br., pp. 33, 35, 41, 48). The rejection of this contention in *On Lee* is a sufficient answer here. Indeed, having long since revealed himself as a law enforcement officer, Davis was less guilty of deception than On Lee's old friend, Chin Poy, who approached his comrade "wired for sound" without intimating that he had turned informer. What was said there in rejecting the argument of trespass by representation is applicable here, 343 U.S. at 752–753:

> By the same token, the claim that Chin Poy's entrance was a trespass because consent to his entry was obtained by fraud must be rejected.

> Whether an entry such as this, without any affirmative misrepresentation, would be a trespass under orthodox tort law is not at all clear. See Prosser on Torts, § 18. But the rationale of the *McGuire* case rejects such fine spun doctrines for the exclusion of evidence. * * *"

The fact is that here, as in *On Lee*, "access to the listening post was not obtained by illegal means." 343 U.S. at 753. But, in the present context, the result would be no different if it were otherwise. Under the circumstances, it would not matter if entry had been gained by subterfuge, for the complaint here has nothing to do with the privacy of the locale or the manner in which access to it was obtained. That petitioner's office was a "private" sanctum is beside the point. There was no search of that room, no seizure of anything found there. Nor was the conversation that occurred within those walls in any way connected with the locale. The confidences made to Davis might, just as well, have been divulged in the agent's office, in a neutral enclosure, or even on a street corner. In short, the secrets of the room were not probed. What petitioner objects to is not the invasion of his private office, but the repetition of an unprivileged conversation.

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[14] In *McGuire* v. *United States*, 273 U.S. 95, 100, this Court held that the fact that officers in the course of a seizure illegally destroyed quantities of liquor did not make illegal the seizure, at the same time, of additional liquor under a search warrant. To the argument that the illegality of the destruction rendered the entry a trespass and tainted the seizure with illegality the court said, "We can impute to the one the illegality of the other only by resorting to a fiction whose origin, history, and purpose do not justify its application where the right of the government to make use of evidence is involved."

It follows that all the talk about gaining *entry* by "misrepresentation" is wholly irrelevant here and that reliance on *Gouled* v. *United States*, 255 U.S. 298, and *Silverman* v. *United States*, 365 U.S. 505, which involved physical penetration into protected places, is altogether misplaced.

C. THERE WAS NO OTHER INVASION OF PETITIONER'S PRIVACY

We have just shown that petitioner's office was not violated. Neither was there prying into his private papers. Nor was his person searched. Petitioner can hardly complain that his secret thoughts were unfairly extracted from him, for they were, from the beginning, intended to be put into words, and to be communicated to the very auditor who heard them. We must remember that the evidence sought to be suppressed is not information bearing on petitioner's tax liability, but the very offer of the bribe. And, of course, the idea of bribing a revenue agent necessarily involves communication of that purpose to the agent. Had petitioner maintained silence, no crime would have occurred. There is accordingly no question here of probing secrets that petitioner might have kept to himself.

For much the same reason, this case cannot be likened to calling an eavesdropper as a witness, or to using a recording device, to introduce evidence of a confidential conversation. As we have said, the intent to bribe could be carried out only through communication to the agent, who was the prospective recipient. Petitioner intended the conversation to be private only in the limited sense that he hoped that the agent would never disclose the attempted bribery. Peti-

tioner knew that the agent would keep the communication secret only if he chose to neglect his sworn official duty. The risk of disclosure was always present, regardless of eavesdropping by any third person. Cf. *Rathbun* v. *United States*, 355 U.S. 107.

The logical consequence of petitioner's argument that the agent's testimony of their conversation should have been excluded is that a government official is guilty of misconduct whenever he reveals an offer of a bribe, in court or to law enforcement officials, or even to his own superiors. For the offeror of a bribe always intends the conversation to be confidential, wherever it occurs, and the official to whom the bribe is offered always knows that the offeror intends the secrecy and that he (the offeree) is to some degree misleading the offeror by remaining silent. The Minifon involved no greater intrusion upon any protected interest in privacy. The device merely made a more permanent record of what petitioner intended for the agent's ears, and knew would reach the ears of anyone to whom the agent made disclosure.

D. THERE WAS NO IMPROPER LAW ENFORCEMENT ACTIVITY

Nothing remains of petitioner's claim except the unspoken accusation that the government has engaged in "dirty business." Although the point has little relation to the rights here asserted,[15] we address ourselves to it briefly.

[15] There is here no reliance on the Due Process Clause of the Fifth Amendment and no appeal to the supervisory power of the Court over the federal judicial system.

As we have already shown, there is no basis for the charge that agent Davis was guilty of entrapment. In our view, that puts an end to the claim of unfairness. Neither the agent's feigned acquiescence in the bribery plan, nor the use of the Minifon, can be condemned under the circumstances. Both are necessary and proper ingredients of effective law enforcement.

Indeed, if the agent's relatively innocuous conduct here is found offensive, *a fortiori*, the whole gamut of investigatorial techniques involving more serious deception must also be condemned. Police officers could then no longer employ confidential informants, act as undercover agents, or even wear "plain clothes." Yet, it has been long accepted doctrine that "stealth and strategy are necessary weapons in the arsenal of the police officer," *Sherman* v. *United States*, 356 U.S. 369, 372, and that the use of decoys and other forms of deception are available techniques of law enforcement so long as the stratagem does not amount to the creation of the criminal design. *Sorrells* v. *United States*, 287 U.S. 435, 441; *Grimm* v. *United States*, 156 U.S. 604, 610. "Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential." *United States* v. *Rabinowitz*, 339 U.S. 56, 65. Cf. *Olmstead* v. *United States*, 277 U.S. 438, 468.[16]

[16] The cases are legion in which a peaceable stratagem has been recognized as constituting a valid enforcement technique. See, *e.g.*, *Kivette* v. *United States*, 230 F. 2d 749 (C.A. 5), certiorari denied, 355 U.S. 935 (law enforcement officers posing as members of the general public obtained information that the defendant was selling liquor illegally); *Archambault* v. *United States*, 224 F. 2d 925 (C.A. 10) (inspector of the United

The conclusion is plain that nothing done here was illegal or outside the bounds of proper law enforcement activity. The fact is that Agent Davis did his job well, and fairly. He needs no discipline. There is accordingly no violation of the strictest exclusionary rules, and no occasion for inventing new "prophylactic" standards.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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States Food and Drug Administration, posing as an "outdoorsman", purchased habit forming drugs from defendant who was posing as a physician); *Stein* v. *United States*, 166 F. 2d 851 (C.A. 9), certiorari denied, 334 U.S. 844 (narcotics agents posing as private citizens); *Weathers* v. *United States*, 126 F. 2d 118 (C.A. 5), certiorari denied, 316 U.S. 681 (decoy letter sent by postal inspector); *United States* v. *Spadafora*, 181 F. 2d 957 (C.A. 7), certiorari denied, 340 U.S. 897 (Secret Service agent posed as distributor of counterfeit money); *Dailey* v. *United States*, 261 F. 2d 870 (C.A. 5), certiorari denied, 359 U.S. 969 (narcotics agent posing as a purchaser).

U. S. GOVERNMENT PRINTING OFFICE 1962